

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Core Communications, Inc.	)	WC Docket No. 03-171
	)	
Petition for Forbearance under 47 U.S.C. §	)	
160(c) from Application of the ISP Remand	)	
Order	)	

**OPPOSITION OF CORE COMMUNICATIONS, INC. TO  
QWEST CORPORATION'S PETITION FOR RECONSIDERATION**

Core Communications, Inc. ("Core"), through counsel, hereby files its opposition to Qwest Corporation's ("Qwest's") Petition for Reconsideration in the above-referenced proceeding.<sup>1</sup>

**I. INTRODUCTION AND SUMMARY**

On July 14, 2003, Core filed a Petition for Forbearance pursuant to 47 U.S.C. § 160(c).<sup>2</sup> Through its Petition, Core sought forbearance from the Commission's *ISP Remand Order* in its entirety.<sup>3</sup> By order released June 23, 2004, the Commission exercised its right under 47 U.S.C. § 160(c) to extend its one year deadline for denying Core's Petition by the statutorily

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<sup>1</sup> Qwest Corporation, Conditional Petition for Reconsideration, WC Docket No. 03-171 (filed Nov. 10, 2004) ("Petition for Reconsideration").

<sup>2</sup> See *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order* ("Petition"), WC Docket No. 03-171 (filed July 14, 2003).

<sup>3</sup> See *id.*, at 1; see also *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001), *remanded*, *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 1012 (2003) ("*ISP Remand Order*").

permitted 90 days.<sup>4</sup> By its own calculation, the Commission's extended deadline for denying the Petition (or any portion thereof) was Monday, October 11, 2004.<sup>5</sup>

On Friday, October 8, 2004, the Commission's media office issued a one-page press release, summarily announcing that on that same day, the Commission had voted on Core's Petition and would subsequently release an order granting in part and denying in part Core's Petition.<sup>6</sup> The press release contains an express disclaimer, which states: "This is an unofficial announcement of Commission action. Release of the full text of a Commission order constitutes official action. *See MCI v. FCC*, 515 F.2d 385 (D.C. Cir. 1974)."<sup>7</sup> The press did not indicate that any appeal period had commenced.<sup>8</sup> The statutory deadline of October 11, 2004 passed without an order from the Commission.

On October 18, 2004, seven days after the expiration of the statutory deadline, the Commission released an order purporting to deny in part and grant in part Core's Petition.<sup>9</sup> On October 27, 2004, Core file a Complaint for Declaratory Ruling and Motion for Summary Judgment with the United States Court of Appeals for the District of Columbia Circuit.

On November 10, 2004, less than 30 days after Core's Petition was granted by operation of law, Qwest filed its Petition for Reconsideration. In the Petition for Reconsideration, Qwest requests that the Commission use "the simple device of issuing a lawful decision finding that, to the extent the Core petition was 'deemed granted' through the passage of

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<sup>4</sup> See *Commission Order*, WC Docket No. 03-171 (rel. June 23, 2004).

<sup>5</sup> See *id.*, at 2 ("the date on which the petition seeking *forbearance* filed by Core shall be deemed granted, in the absence of a Commission denial of the petition for failure to meet the statutory standards for forbearance, is extended to October 11, 2004.") (emphasis added).

<sup>6</sup> See *NEWS, FCC Grants Partial Forbearance From ISP Remand Order* ("press release"), Federal Communications Commission, Office of News Media Information (rel. Oct. 8, 2004).

<sup>7</sup> See *id.*

<sup>8</sup> *Id.*

<sup>9</sup> See *Commission Order*, WC Docket No. 03-171 (rel. Oct. 18, 2004).

time, that decision is reversed on reconsideration for the reasons stated” in the untimely October 18 Order.<sup>10</sup> Essentially, Qwest requests the Commission to utilize reconsideration as a vehicle to take away rights vested in Core by statute at midnight on October 11, 2004.

The Commission summarily should deny Qwest’s Petition for Reconsideration for at least two reasons. First, because Core’s Petition was deemed granted by operation of law, the rights arising from that grant are statutory and cannot be disturbed through reconsideration. Indeed, were reconsideration a plausible means of defeating the statutory timeline and remedy established by Congress, Section 10 would be meaningless. Second, because Qwest raises no question of fact or law that satisfies the standard for reconsideration set forth in the Act and the Commission’s rules and orders, Qwest’s Petition for Reconsideration must be denied in any event. Indeed, Qwest presents absolutely nothing for the Commission to “reconsider.” Reconsideration simply does not provide the Commission with a vehicle to trump the statutory deadline and remedy provided by Congress in Section 10.

## **II. THE COMMISSION MUST DENY QWEST’S PETITION FOR RECONSIDERATION FOR LACK OF JURISDICTION**

Once the statutory deadline (October 11, 2004) passed, the Commission was divested of jurisdiction to decide Core’s Petition because the Petition was already deemed granted by operation of law. Any other finding by the Commission impermissibly would disrupt the statutory deadline and express remedy set forth by Congress in Section 10. Accordingly, there can be no doubt that the Commission may not reach back in time on reconsideration to take away what was granted by Congress by operation of law.

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<sup>10</sup> Petition for Reconsideration at 1-2. Qwest also reserves the right to appeal the October 18 Order.

Core agrees wholeheartedly with Qwest that the language of Section 10 “is plain and unambiguous.”<sup>11</sup> That legal reality, however, cuts in favor of Core and against Qwest. Congress’ rigid deadline is specific and intentional and is designed to “force the [Commission] to eliminate outdated regulations, and do so in a timely manner.”<sup>12</sup> Put another way, Congress imposed a time limit and a remedy, neither of which may be defeated or otherwise disrupted on reconsideration. Indeed, were this not the case, the timeline and remedy contained in Section 10 easily could be defeated through reconsideration. Except for some very narrow circumstances that are irrelevant in the forbearance context, the Commission is under no timetable to resolve petitions for reconsideration. As a result, were Qwest correct, the mere filing of a petition for reconsideration would add months or even years to the statutory deadline established by Congress in Section 10. Such a result would be nonsensical. The natural and correct reading of Section 10 is that once Core’s petition was granted by operation of law, there was nothing left for the Commission to do because the Commission no longer had the proceeding before it.<sup>13</sup>

Federal courts have recognized that where Congress prescribes a specific consequence for agency inaction by a certain deadline, that consequence will be enforced. As one example, the Seventh Circuit found that the Federal Reserve Board was divested of jurisdiction where a statute granting the Board jurisdiction over applications for approval to form

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<sup>11</sup> Qwest Petition for Reconsideration at 5.

<sup>12</sup> See 141 Cong. Rec. S7881-02, S7898 (1995) (statement of Sen. Dole).

<sup>13</sup> Of course, the Commission does have other proceedings before it in which it can promulgate rules related to intercarrier compensation for ISP-bound traffic. As one example, the Commission could issue an order in CC Docket 99-68 to resolve the D.C. Circuit’s remand in *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 1012 (2003), which resulted from the D.C. Circuit’s decision in *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000), which vacated the FCC’s Declaratory Ruling in *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, 14 FCC Rcd. 3689 (1999).

a bank holding company provided that such applications “shall be deemed to have been granted” in the event of failure of the Board to act within the statutory ninety-one-day period.<sup>14</sup> Similarly, the Western District of Wisconsin found that “[w]hen Congress says expressly that it wants amendments not approved within 45 days to be deemed approved, it has provided a remedy...,” and nothing can go “back to the agency for further consideration without interfering with the congressional scheme.”<sup>15</sup>

This is exactly the case here. In crafting Section 10, Congress’ provided an express deadline and remedy:

Any such petition **shall be deemed granted if the Commission does not deny the petition** for failure to meet the requirements for forbearance under subsection (a) of this section within one year after the Commission receives it....<sup>16</sup>

The consequence for Commission inaction is the granting of forbearance by operation of law, which, of course, necessarily results in divestiture of the Commission’s jurisdiction over any petition.<sup>17</sup> Here, since the Commission did not issue an order denying Core’s Petition within the statutory deadline – even after availing itself of the maximum 90-day extension provided for by the statute – the Petition was deemed granted by operation of law, and the Commission was thereafter divested of jurisdiction to decide the question.

Consequently, there is nothing more for the Commission to do. The Commission simply lacks the ability to “reconsider” the statutory right that vested in Core, as Qwest suggests. Qwest implicitly concedes this point, noting that “it is clear that the time constraints set forth in

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<sup>14</sup> *Tri-State Bancorporation, Inc. v. Board of Governors of Federal Reserve System*, 524 F.2d 562, 568 (7<sup>th</sup> Cir. 1975)

<sup>15</sup> *The Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 327 F.Supp.2d 995, 999 (W.D. Wisc. 2004)

<sup>16</sup> 47 U.S.C. § 160(c) (emphasis added).

<sup>17</sup> *Tri-State*, 524 F.2d at 568.

Section 10(c) of the Act are meant to have teeth, and that the ‘deemed granted’ language of [Section 10] means what it says.”<sup>18</sup> This concession by Qwest wholly obliterates Qwest’s suggestion that the Commission can extend a statutory deadline and remedy through reconsideration.<sup>19</sup> Any such result would eliminate the very “teeth” Congress provided in Section 10. Accordingly, the Commission must deny Qwest’s Petition for Reconsideration for want of jurisdiction.

### **III. QWEST’S PETITION FOR RECONSIDERATION FAILS TO MEET THE STANDARD OF REVIEW SET FORTH IN THE ACT AND IN THE COMMISSION’S RULES AND ORDERS**

Even if the Commission did have jurisdiction to reconsider the grant of Core’s Petition by operation of law (which it does not), the Commission must deny Qwest’s Petition for Reconsideration. Under the Act and the Commission’s rules and orders, the Commission may only grant reconsideration in instances where new evidence of fact or law is presented. Qwest makes no effort to offer any such evidence, and therefore, the Commission must reject Qwest’s Petition for Reconsideration.

At the outset, by statute the Commission may only consider “newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding” in reviewing a Petition for Reconsideration.<sup>20</sup> This

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<sup>18</sup> Qwest Petition for Reconsideration at 4. Qwest’s assertion that under Section 10 the Commission must “engage in reasoned decision-making,” *id.*, when addressing a forbearance petition applies only to denials of such petitions. When the Commission does not act, as is the case here, the statute – not the Commission – provides the relief requested. The Commission has no authority to override the remedy provided by Congress..

<sup>19</sup> *Id.*

<sup>20</sup> 47 U.S.C. § 405(a).

limit on the evidence that the Commission may review on reconsideration clearly is reflected in the Commission's rules and orders.<sup>21</sup> Qwest, however, produces no evidence that satisfies the standard set forth for reconsideration under the Act because none exists. Rather, Qwest seeks an impermissible "do over," which, if acted upon by the Commission, would eviscerate the statutory deadline and remedy set forth by Congress in Section 10.

As demonstrated above, when the Commission does not timely act to deny a petition for forbearance, Congress – through Section 10 – steps in and provides the relief requested. Section 10 does not require the Commission to explain its inaction. An explanation (*i.e.*, an order with force of law) only is required to the extent the Commission denies in whole or in part a petition for forbearance. In this case, the Commission's failure to act resulted in a grant of the relief requested, and there is nothing for the Commission to reconsider.

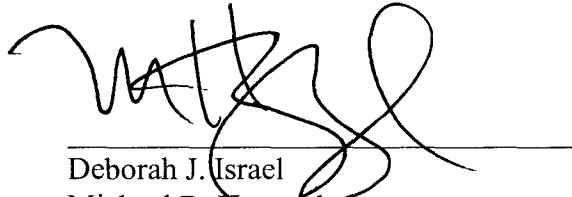
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<sup>21</sup> See, *e.g.*, 47 C.F.R. § 1.106(l) ("No evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or the designated authority believes should have been taken in the original proceeding shall be taken on any rehearing ordered pursuant to the provisions of this section."); see also, *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues*, Order on Reconsideration, 16 FCC Rcd 16544, 16546 (2001) ("Our response to the petitions are governed by the Communications Act and our own rules. Reconsideration of a Commission decision is warranted only if the petitioner cites a material error of fact or law, or presents additional facts and circumstances which raise substantial or material questions of fact that were not considered and that otherwise warrant Commission review of its prior action." (internal citations omitted)).

#### IV. CONCLUSION

Consistent with the discussion presented herein, the Commission should deny Qwest's Petition for Reconsideration.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'WATZSL', is written over a horizontal line.

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November 18, 2004



## CERTIFICATE OF SERVICE

I, Edilma M. Carr, hereby certify that a true and correct copy of the foregoing "Opposition of Core Communications, Inc. to Qwest Corporation's Petition for Reconsideration" to be 1) Filed with the FCC, via its Electronic Comment Filing System in WC Docket No. 03-171, 2) served, via email on the FCC's duplicating contractor, Best Copy and Printing, Inc. at fcc@bcpiweb.com and 3) served via First Class United States Mail, postage prepaid, on the parties listed on the following service list.

  
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November 18, 2004

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